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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 169

UNITED STATES TRUST COMPANY OF NEW YORK, Trustee under deed of trust of John F. Wilson, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 95–105) is not reported. The opinion of the Circuit Court of Appeals (R. 272–278) is reported in 75 F. (2d) 973.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 11, 1935 (R. 278). A petition for rehearing filed March 27, 1935, was denied on

March 27, 1935 (R. 279–280). The petition for certiorari was filed June 25, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A deed creating a single trust for the equal benefit of three beneficiaries was amended, whereby a separate account was set up for each beneficiary and an undivided one-third interest in the trust was assigned to each account. Did the amendments create three separate and independent trusts, to which proportionate amounts of the income from the property are separately taxable, or did the original single trust continue as such, to which all the income from the property is taxable?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 15–16.

STATEMENT

The taxpayer is the trustee of the trust created by John P. Wilson by deed dated March 12, 1913, whereby certain stocks were transferred in trust for the benefit of the grantor's three children, John P. Wilson, Jr., Martha Wilson, and Anna W. Dickinson. It was provided that the net income should be paid over and distributed, one-third to each of the three children so long as they should live and upon the death of any one of the principal bene-

ficiaries his one-third of the net income should be paid over and distributed in accordance with any directions in his will and in default of such directions, then to the surviving issue of the deceased beneficiary, and in default of such issue, to the surviving original beneficiaries. The trust was terminable at any time in whole or in part by the three children of the grantor, subject to the approval of the grantor if living, and terminates in any event upon the death of the survivor of the three children. Upon termination of the trust the principal or corpus of the estate is distributable in equal shares, one-third each to the three children if living, the share of any deceased child to be distributed as directed by his will. It was further provided that the trust instrument might be altered, changed, or modified in any manner and to any extent by the three children by an instrument in writing filed with the trustee, subject to the approval of the grantor, if living. It was stipulated that the instrument should be construed according to the laws of the State of Illinois (R. 65–77).

In accordance with the trust instrument, the three beneficiaries with the approval of the grantor executed three amendments to the trust. The first, dated September 21, 1918, required the division of the trust estate into three separate and equal parts or shares, each designated by the respective names of the three children and the assignment of undivided interests in the estate to each share was au-

thorized. One-half of the net income from each share after December 31, 1918, was to be added to the principal of such share, subject, however, to the right of any beneficiary to receive in any year upon his written request, approved by the grantor, the whole or any part of the one-half of the net income from his share of the trust estate directed to be accumulated. In all other respects the original deed of trust was continued in full force and effect (R. 79–81).

The second amendment, dated June 19, 1919, provided that one-half of the net income of each of the three trust estates (i. e., of each share of the trust estate) should be paid over and distributed as received to the beneficiaries entitled thereto and the remaining one-half of such net income should be paid over in whole or in part to the beneficiaries entitled thereto when requested in writing by two of the original beneficiaries, any of the net income not paid over or distributed to be added to the principal of the trust fund from which derived. The original trust deed as theretofore amended, except as modified, was continued in full force and effect (R. 82–85).

The third amendment, dated December 1, 1920, provided that the trustee should pay out each year so much of the net income from each of the separate trusts to the beneficiaries entitled thereto as should be requested in writing by the majority of the beneficiaries, subject, however, to the require-

ment that equal payments be made out of the net income from each of the said separate trusts so that each trust should be maintained on a basis of equality in amount so far as practicable (R. 86–89).

The grantor of the trust died October 3, 1922, and Martha Wilson, one of the original beneficiaries, died on December 25, 1923 (R. 132).

The deed of trust was again amended on April 25, 1928, by the two surviving original beneficiaries to authorize the trustee to borrow such sum or sums of money as should be authorized and directed in writing by John P. Wilson, Jr., son of the grantor and one of the original beneficiaries (R. 133–136).

Prior to the amendment of September 21, 1918, the trustee kept its accounts as a single trust for the three beneficiaries; after that date the capital account was divided into three equal parts and one assigned to each individual beneficiary for whom a separate account was kept from that date (R. 144–146). The trust property at all times consisted of corporate stocks and cash (R. 138). There was not at any time an actual division of the trust assets or property among the beneficiaries, but separate accounts were maintained and a one-third interest in each item of property, regardless of when acquired, was assigned to the account of each beneficiary. No particular certificates of stock and no segregated amount of cash were distributed to the respective accounts of the three original beneficia-

ries. There was set up in the account of each beneficiary his undivided one-third interest in each item of trust property. Income received from the trust property was divided and carried in equal amounts to the beneficiaries' accounts. The shares of stock held in the several corporations were carried in several certificates, not in equal one-thirds but in round amounts. The certificates were held in the name of the taxpayer as trustee under the original deed of trust or in the name of a nominee of the trustee. After the amendments to the original deed of trust the certificates of stock were not surrendered to the various corporations and new certificates issued. Other than the establishment of three separate accounts on the books, in which the interests of the original beneficiaries were set up after the amendment of September 1918, the trustee treated the estate or property as held in one trust. The trustee at all times kept only one bank account into which all receipts of cash went and from which all disbursements of cash were made (R. 146–149, 156–163).

The amendments to the deed of trust were made for the purpose of reducing taxes on undistributed income from trust property to be accumulated by having the same taxed as income of three separate trusts or entities rather than as income of one trust or entity (R. 136).

For the years 1924 to 1929, inclusive, the trustee filed separate fiduciary and income tax returns for

each beneficiary on the theory of there being three separate trust estates. The gross income, deductions and tax liability of each beneficiary for each year as shown on the returns were the same in amount. The Commissioner, upon audit of the returns, determined that there was but one trust estate held for three beneficiaries, and that the income from all of the property was taxable as a unit to the one trust (R. 27, 45, 65, 164–266).

Pursuant to the applicable statutes (Revenue Acts of 1924 and 1926, Section 219 (a), (b) (2) (3); Revenue Act of 1928, Sections 161 (a), 162 (b), (c), the Commissioner included in the taxable income of the single trust for each year all income from the trust property which was not distributed and was not distributable currently to the beneficiaries, deductions being allowed the trust for income paid or actually distributed to the beneficiaries (R. 27, 28, 45, 47). The only issue submitted is whether that part of the income from the trust property "which was not distributed or distributable to the beneficiaries is subject to income tax on the basis of a single trust or three trusts" (R. 95–96, 122–123). The tax upon the total income from the trust property on the basis of a single trust exceeds the aggregate taxes on the basis of three separate trusts.

The Board of Tax Appeals held that the amendments to the original deed of trust created three trust estates and that the income should be taxed

on the basis of three separate trusts. The Circuit Court of Appeals reversed, holding that the amendments were ineffective to divide the original single trust estate into three separate trusts and that the income should be taxed on the basis of one trust.

ARGUMENT

The Circuit Court of Appeals held that the trust property was held and administered, after the amendments as well as before, as a single estate and that the amendments to the original trust deed, which deed admittedly created only one trust for the equal benefit of the three children, did not divide the single estate into three separate trusts but resulted only in the establishment by the trustee of three accounts, one for each beneficiary. The decision below, we submit, is entirely sound.

Whether the amendments to the deed of trust were effective to create, out of the one trust estate admittedly set up by the original deed, three separate and independent trusts and entities requires a construction of the instruments amending the original deed. The intent of the parties to a written instrument, in aid of its construction, is to be ascertained not alone from particular words used but from the instrument or instruments as a whole and together, read in the light of all surrounding circumstances. In determining the effect of these amendments, what was actually done, rather than the design and purpose of the parties, must control.

United States v. *Phellis*, 257 U. S. 156, 172. An unexecuted intention has no effect and is a nullity.

Admittedly there was created by the grantor only one trust estate, consisting of certain stocks and other securities, for the benefit primarily of his three children, each of whom possessed an equal one-third interest in the income and in the principal upon termination of the trust. It is plain, from the facts hereinabove recited, that the amendments to the trust deed did not create three separate and distinct trust estates, and resulted at the most in the opening of a separate account on the books of the trustee for each beneficiary, in which was recorded as a matter of bookkeeping convenience the undivided interest of the beneficiary in the aggregate estate. Notwithstanding the references in the amendments to the accounts as separate trust estates, and the testimony of the witness as to the purpose of the amendments, it is clear that separate and distinct identified estates were not created nor was the property administered as separate estates. The only changes made by the amendments in respect of the trust property and the administration thereof was to set up a separate book account for each beneficiary to which was assigned his undivided interest, whereas only one account had been maintained theretofore. In every substantial respect the trust property at all times was held and administered by the trustee as a single trust estate for the equal benefit of the three children, after as well as before the amendments.

In the light of these facts, it seems plain that the Circuit Court of Appeals correctly construed the amendments as effecting only the establishment of three accounts and not three separate and independent trust estates. It is essential to the creation of a trust that three conditions or circumstances concur; first, there must be sufficient words to raise it; second, there must be a definite subject; and third, there must be an ascertained object; and if any one element be lacking the attempted trust must fail. *Marble* v. *Marble,* 304 Ill. 229, 235; *Snyder* v. *Snyder,* 280 Ill. 467, 469–470; *Thomas* v. *Clay,* 187 N. C. 778, 783. Cf. *Leach* v. *Godwin,* 198 N. Y. 35.

The respondent does not contend, nor did the court below hold, that an undivided interest in specific property cannot be made the subject of a trust. The respondent maintains, and the court below held, merely; that reading the amendments each as a whole, and together, in the light of the acts of the parties, the single-trust estate created by the original deed was not subdivided by the amendments into three separate and distinct trusts. It will be noted that although the amendments directed the division of the trust estate into three equal parts, and the income was made distributable upon request of any two beneficiaries, the trustee was required to make equal distributions of income, if any, to all beneficiaries, whether or not the third beneficiary requested or desired his share. More-

over, there was no change in the capacity in which the trustee held the property; the property continued to be held by the trustee or in the name of his nominee as such under the original deed for the equal benefit of all beneficiaries and not in separate and distinct parts as trustee of an identified portion of the property for each beneficiary individually. The amendments specifically provided that the original deed should remain in full force and effect except as modified by the amendments. All that the amendments accomplished was to set up separate accounts for the beneficiaries, recording their undivided interests in property held under the original trust deed and additions thereto. Such property was held in aggregate as a single trust and there was not at any time a division thereof. The amendments cannot be effective as creating separate and distinct trusts for lack of definite subjects.

Apparently the principal, if not the sole, object of the amendments was to reduce or minimize the Federal tax upon the income derived from the aggregate trust property. A consideration of the language of the amendments and of the attendant circumstances surrounding the administration of the trust property would seem to indicate that the parties, in order to avoid any inequality of beneficial interest, carefully drew the amendments to prevent any actual division of the trust estate and trust property into three separate and distinct

trusts. It seems plain, in any event, that no such division was made and that at most the amendments resulted in the establishment of a separate account for each beneficiary, nothing more than a matter of bookkeeping.

All the trust property was held as a unit by the trustee, after the amendments as well as before, all cash being carried in one fund and all stocks being held in the name of the trustee, or a nominee, as such under the original deed and not in proportionate amounts as trustee for the several beneficiaries independently. Distributions of income were subject to the control and directions of the beneficiaries acting jointly, either all together or one with the approval of the grantor or any two together, and changes in the trust property could be made only upon the written directions of two of the beneficiaries (R. 67–68, 69, 71, 80, 82–83, 88, 136–137, 145–146, 156–158). All distributions of income had to be in equal amounts to all beneficiaries and all accounts were maintained equal (R. 88, 145, 163.)

The decision below is in accord with the decisions of other Circuit Courts of Appeals and the Court of Claims, and the Board of Tax Appeals. *State Sav. Loan & Trust Co.* v. *Commissioner*, 63 F. (2d) 482 (C. C. A. 7th); *Johnson* v. *United States*, 65 C. Cls. 285; *Rauers* v. *Commissioner*, 28 B. T. A. 516; *Sparrow* v. *Commissioner*, 18 B. T. A. 1; *Campbell* v. *Commissioner*, 15 B. T. A. 414.

The decision below is not in conflict as to principles of law with the decisions of any other Circuit

Court of Appeals. It is argued by petitioners that there is a conflict with *Commissioner* v. *McIlvaine & Wilson* (C. C. A. 7th), decided July 19, 1935, not yet reported, but found in 353A C. C. H. p. 10274, which construed certain amendments, similar to those here involved, to another deed of trust, by the same grantor and for the same beneficiaries as here involved, as creating three separate and independent trust estates.

In the *McIlvaine & Wilson case*, as here, there was created by the original deed of trust a single trust estate for the equal benefit of the grantor's three children and the beneficiaries were authorized to amend, alter, modify or change the deed in any way, subject only to the approval of the grantor, if living. Three amendments were made, as authorized, which in all material respects were substantially like, and to the same effect as, the amendments made in the instant case. The Seventh Circuit Court of Appeals, however, took the view that the intent of the parties to create three separate and distinct trusts was plain and that the amendments effectively executed that intent.

While the *McIlvaine & Wilson case* presented the same question and rested upon substantially the same facts as the instant case, and the two Circuit Courts of Appeals reached opposite conclusions, both cases involve merely the construction of certain written instruments, amendments to the original deeds of trust. Neither case involves any unsettled principle of law of general importance.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. There is no conflict of decisions, except as already noted. The case rests upon its own particular facts and involves no important general principle of law. The petition for certiorari should be denied.

Respectfully submitted.

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AUGUST 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 833, 838:

SEC. 143. FIDUCIARY RETURNS.

(a) *Requirement of return.*—Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

* * * * *

(4) Every estate or trust the net income of which for the taxable year is $1,500 or over;

(5) Every estate or trust the gross income of which for the taxable year is $5,000 or over, regardless of the amount of the net income; * * *.

SEC. 161. IMPOSITION OF TAX.

(a) *Application of tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

* * * * *

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 143.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

The material provisions of the Revenue Acts of 1924, c. 234, 43 Stat. 253, and 1926, c. 27, 44 Stat. 9, are found in Sections 219 and 225 (U. S. C., Title 26, Secs. 960 and 966; and U. S. C. App., Title 26, Secs. 960 and 966), and are identical with the quoted provisions of the Revenue Act of 1928.

U. S. GOVERNMENT PRINTING OFFICE: 1938